No. 681

IN THE

Supreme Court of the United States

October Term, 1948.

DINAH SHAW, a stockholder of CELANESE CORPORATION OF AMERICA, suing on behalf of herself and all other stockholders similarly situated and on behalf of and in the right of CELANESE CORPORATION OF AMERICA,

Petitioner,

against

CAMILLE DREYFUS and CELANESE CORPORATION OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Brief and Argument in Support of the Petition.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Dinah Shaw, a stockholder of respondent, Celanese Corporation of America, suing on behalf of herself and all other stockholders similarly situated, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, rendered January 19, 1949, which affirmed (Mr. Justice Charles E. Clark dissenting) the judgment of the District Court of the United States for the Southern District of New York against petitioner and in favor of respondents by denying petitioner's motion for summary judgment and granting respondents' cross-motion for summary judgment dismissing the complaint.

Opinions Below.

The opinion of the District Court is reported in 79 F. Supp. 533, and is also printed in the record (R. 55-59).

The majority opinion of the United States Court of Appeals affirming the judgment of the District Court, and the dissenting opinion written by Mr. Justice Clark in favor of reversing the judgment of the District Court, are reported in 172 F. (2d) 140 and are printed in the record (R. 68-73).

Jurisdiction.

The judgment of the United States Court of Appeals was entered January 19, 1949 (R. 73, 74). The jurisdiction of the District Court is founded on the provisions of Section 27 of the Securities Exchange Act of 1934, 48 Stat. 902, Title 15 U. S. C., Section 78aa.[1] The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U. S. C., Section 347a).

Summary Statement of the Case.

Petitioner, a stockholder of respondent, Celanese Corporation of America, instituted an action on behalf of herself and other stockholders similarly situated, pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78p(b),[2] to compel the respondent, Dreyfus, an officer and director of the corporation, to account for and pay over to the corporation the profits which he realized from his "purchases and sales and sales and purchases" of the corporation's listed equity securities within periods of less than six months (R. 3-11).

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[1] The text of the statute appears in Appendix at page 21.

[2] The text of the statute appears in Appendix at pages 21, 22.

The respondent, Dreyfus, was an Officer, Director and Chairman of the Board of the respondent, Celanese Corporation of America (R. 4, 38, 56). The equity securities of the respondent corporation were and still are listed on a National Securities Excharge (R. 4).

Pursuant to resolutions adopted by its Board of Directors, the respondent corporation offered and granted to its common stockholders of record Rights to subscribe at $50 a share to additional shares of common stock on the basis of one share for each ten (10) shares held. The Rights were mailed out on October 9, 1945, and could be exercised on or before October 24, 1945 (R. 38, 39).

Respondent, Dreyfus, was the holder of record of 106,343 shares of the corporation's common stock, and accordingly, he was offered, granted and received 106,343 Rights from the corporation entitling him to subscribe for 10,634 3/10 shares of its common stock (R. 39).

During the month of October, 1945, the respondent, Dreyfus, sold 76,340 of the aforementioned Rights for which he received the net sum of $5,915.41 (R. 42).

On October 22, 1945, the respondent, Dreyfus, exercised 30,000 of his remaining Rights and subscribed for and was issued 3,000 shares of the corporation's common stock. Of these 3,000 shares, Dreyfus disposed of 1,460 shares thereof by means of gifts between November 12, 1945, and January 6, 1946. The market price of the stock on the dates the gifts were made was $57 3/8-$65 5/8 per share. The donees were three friends who were officers and/or directors of respondent corporation, ten members of their families, a personal employee, two employees of the respondent corporation and five of his relatives (R. 24, 46, 47).

In the courts below, petitioner contended that the acquisition by Dreyfus of the Rights to subscribe to the respondent corporation's common stock constituted a "purchase" within the definition of the word as set forth in Section 3(a)(13) of the Securities Exchange Act of 1934, Title 15 U. S. C., Section 78c(a)(13),[3] and within the meaning, intent and purpose of Congress in enacting the Act; that since there was a "purchase" followed by a "sale" within the six-month period, the net profit resulting therefrom is recoverable by the Corporation. Petitioner further contended that the gifts of common stock made by respondent, Dreyfus, constituted a "sale" within the definition of the word as set forth in Section 3(a)(14) of the Securities Exchange Act of 1934, Title 15 U. S. C., Section 78c(a)(14),[4] and within the meaning, intent and purpose of Congress in enacting the Act; that since there was a "purchase" of the common stock by Dreyfus, followed by a "sale" within the six-month period, the resulting profit is recoverable by the Corporation.

The Courts below have held in dismissing the complaint (1) that the acquisition of the Rights by Dreyfus did not constitute a "purchase" within the meaning and intent of Section 16(b) and 3(a)(13) of the Securities Exchange Act of 1934; (2) that the disposition of common stock by Dreyfus by means of gifts did not constitute a "sale" within the meaning and intent of Sections 16(b) and 3(a)(14) of the Securities Exchange Act of 1934.

Questions Presented.

A. Did the acquisition by respondent, Dreyfus, from the respondent Corporation of the 106,343 Rights to subscribe to the Corporation's common stock constitute a "Purchase" within the meaning and intent of Sections

[3] The text of the statute appears in Appendix at page 22.
[4] The text of the statute appears in Appendix at page 22.

16(b) and 3(a)(13) of the Securities Exchange Act of 1934?

B. Did the disposition by "Gifts" by respondent, Dreyfus, of the 1,460 shares of respondent Corporation's common stock constitute a "Sale" within the meaning and intent of Sections 16(b) and 3(a)(14) of the Securities Exchange Act of 1934?

Specifications of Errors to be Urged.

The United States Court of Appeals erred as follows:

1. In holding that the acquisition of the Rights by Dreyfus did not constitute a "purchase" within the meaning and intent of Congress in enacting Sections 16(b) and 3(a)(13) of the Securities Exchange Act of 1934.

2. In holding that the disposition by Dreyfus of common stock by means of gifts did not constitute a "sale" within the meaning and intent of Congress in enacting Sections 16(b) and 3(a)(14) of the Securities Exchange Act of 1934.

Reasons Relied on for Granting Petition.

This Certiorari is not sought for the purpose of reviewing facts but is based on the following grounds:

1. The decision of the United States Court of Appeals, the review of which is here prayed for, is in conflict with the decisions in *Park & Tilford, Inc., v. Schulte*, 2 Cir., 160 F. (2d) 984, Cert. denied, 68 S. Ct. 64, and *Smolowe v. Delendo Corporation*, 2 Cir., 136 F. (2d) 231, Cert. denied, 230 S. Ct. 751.

2. These conflicting decisions concerning the purpose and intent of Congress in enacting Section 16(b) of the Securities Exchange Act of 1934 involve important ques-

tions of national scope and are of the greatest importance and concern to the investing public of the United States. The obvious purposes of the Act will be defeated if the decision of the lower Court is adhered to. Only by giving Section 16 (b) the construction Congress intended will the purposes of the Act be accomplished and the public protected.

3. The decision of the United States Court of Appeals creates new law and new interpretations and is sufficiently important to warrant this Court to pass upon the legal questions involved.

4. In holding that the acquisition of the Rights by Dreyfus did not constitute a "purchase," and that the disposition of stock by Dreyfus by means of gifts did not constitute a "sale" within the meaning and intent of Section 16(b) of the Securities Exchange Act of 1934, the United States Court of Appeals has committed obvious error by construing "purchase" and "sale" contrary to the definitions given therefor in Sections 3(a)(13) and 3(a)(14), respectively, of the Securities Exchange Act of 1934.

5. As the obvious conflict and importance of the questions involved so clearly demonstrate the necessity for a review by this Court of the decision below, petitioner has not attempted in this petition to set forth at length the contentions on the merits of the controversy. The position of petitioner is stated at some length in the dissenting opinion of Mr. Justice Clark at record pages 72-73 and in the Brief submitted by petitioner herewith.

WHEREFORE, it is respectfully submitted that the Writ of Certiorari herein prayed for should issue.

March, 1949.

DINAH SHAW,
Petitioner.

By MORRIS J. LEVY,
Attorney for Petitioner.

BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION.

POINT I.

The acquisition of the option rights by respondent, Dreyfus, from the corporation constituted a "purchase" within the meaning and intent of Section 16(b) of the Securities Exchange Act of 1934.

Section 3(a)(11) of the Securities Exchange Act of 1934, Title 15 U. S. C. A., Section 78c(a)(11), provides as follows:

> "The term 'equity security' means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; *or any such warrant or right;* or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." (Italics supplied.)

Section 3(a)(13) of the Securities Exchange Act of 1934, Title 15 U. S. C. A., Section 78c(a)(13), defines the words "Buy" and "Purchase" as follows:

> "The terms 'buy' and 'purchase' each include *any contract to* buy, purchase, or *otherwise acquire.*" (Italics supplied.)

In *Kogan v. Schulte* (D. C., S. D. N. Y.), 61 F. Supp. 604, 608, Mr. Justice Leibell said:

> "Under Section 3(a)(13) of the Act, 15 U. S. C. A., Section 78c(a)(13). 'The terms "buy" and "purchase" each include any contract to buy, pur-

chase or otherwise acquire.' The above quoted definition supplements and adds to the ordinary interpretation of the word 'purchase' so as to include not only an actual purchase, but also any contract to buy, purchase or otherwise acquire."

The word "purchase" itself was not defined by the Act. But in enlarging its scope by Section 3a(13), Congress disclosed a clear *intent* to give it a broad, unrestricted meaning. Its full import is to be sought, therefore, from its associated words and the declared purpose of the act. *Smolowe v. Delendo Corporation*, 2d Cir., 136 F. (2d) 231, 238, Cert. denied, 230 U. S. 751; *Kogan v. Schulte, supra; Helvering v. Hammel*, 311 U. S. 504, 510; *Burnstein v. U. S. Lines Co.*, 2d Cir., 134 F. (2d) 89, 93.

The word "purchase" ordinarily represents an executed transaction. In declaring that the word includes "any contract to buy, purchase, or otherwise acquire," Section 3(a)(13) has added the executory transaction as well. But in describing the *kind* of *executory* transactions that are included by "purchase," the section is equally describing the kind of *executed* transactions that were intended to be embraced by the word. Had it been the Legislative intent to restrict the application of the Act, where a present transaction is involved, solely to a purchase for cash, Section 3(a)(13) would have added its corresponding executory contract. Therefore, unless it be assumed that the section arbitrarily included "any contract to * * * otherwise acquire" (that is to say a transaction which is entirely extraneous to the definition of "purchase"), it is reasonable to infer that the word was used in its widest sense of *any acquisition* rather than in its colloquial sense of a cash purchase.

Since the word "purchase" as used in the Act has been defined to include "any contract to * * * otherwise acquire," it would be pertinent to see how the word "ac-

quire" is defined in the English language. Funk & Wagnall's "New Standard Dictionary of the English language" defines the word as follows:

> "Acquire: * * * get as one's own; *receive or gain in whatever manner;* * * *." (Italics supplied.)

"Bouvier's Law Dictionary," Third Edition, defines the word as follows:

> "Acquire.—To make property one's own. To gain permanently. It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition. *It has been held to include a taking by devise. Santa Clara Female Academy v. Sullivan,* 116 Ill. 376; 8 N. E. 183, 56 Am. Rep. 776." (Italics supplied.)

That the word "purchase," when used in a statute, must be given a broader meaning was indicated in *Johnson v. United States,* 9 Cir., 145 F. (2d) 137, where it was said (p. 138):

> "The provision for the 'purchase' of additional supplies does not necessarily mean a transfer for cash of stamp supplies by the government to clerks of contract stations and a resultant transfer of title * * *."

Hence, even as "purchase" includes any executory "contract to * * * otherwise acquire," so in its executed phase the word includes any present acquisition, whether for cash or otherwise. Admittedly, the respondent, Dreyfus, "otherwise acquired" the Rights from the Corporation, for only by first acquiring them could he afterwards have sold them.

Additional support for our view may be found in Section 16(b) itself. It will be observed that the section excludes from its operation any security which "was acquired in good faith in connection with a debt previously

contracted." It is clear, first of all, that "purchase" was used interchangeably with "acquisition." Secondly, by expressly excluding a security which is acquired otherwise than for cash, it is clear that "purchase" was meant to embrace such other acquisitions; conversely, if the word was intended to represent only cash transactions it would have been unnecessary to exclude, in express terms, a different type of transaction. Finally, in specifying the particular acquisition that is outside its scope, Section 16(b) by implication includes all other acquisitions.

In the Court below, the respondents argued that the mere acquisition by Dreyfus of the option rights from the corporation did not constitute a purchase. They argued that a purchase could only take place upon the conversion of the rights into common stock by payment of the subscription price therefor. We think that the statute permits the corporation to select either act (the contract to purchase or the payment of the subscription price) as the initial transaction. If the respondents' contention were upheld, evasion of the Act would become a simple matter. A director or officer of a corporation would then accomplish by indirection that which he is not permitted to do directly. Instead of converting rights to common stock by paying the subscription price therefor and *then* selling the common stock, within a six months' period, thus making the director or officer liable under the Act to the corporation for any profits he might realize thereon, he would merely have to sell his rights, take his profits and thereby fully escape the penalties, provisions and intent of the Act.

As Mr. Justice Clark stated in his dissenting opinion at record page 72:

> "• • • and 'contract' is broad enough to include an 'executed acquisition.' *Park & Tilford, Inc., v.*

> *Schulte*, 2 Cir., 160 F. 2d 984, 987, certiorari denied, *Schulte v. Park & Tilford, Inc.*, 332 U. S. 761. The statutory language is therefore inclusive enough to reach these transactions."

In *Smolowe v. Delendo Corporation, supra*, the Court said, at page 239:

> "The statute is broadly remedial. Cf. *Wright v. Securities and Exchange Commission*, 2nd Cir., 112 F. (2d) 89. Recovery runs not to the stockholder, but to the corporation. We must suppose that the statute was intended to be thorough-going, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director or stockholder and the faithful performance of his duty."

The Court also said (p. 238) that no meaning should be ascribed to the statute which is inconsistent with its declared purpose; that any interpretation that could make evasion possible and thus result in the emasculation of the Act must be avoided. With this in mind, the rule for determining the recoverable profits was fashioned so as to prevent evasion of the Act.

We dare say that the word "purchase" was deliberately left undefined in the statute for if any specific transaction had been described as coming within its purview, the way would have been left open for many ingenious forms of evasion. However, the word's commonly accepted meaning in legal usage (as any acquisition) is sufficiently clear to make the application of the statute to a particular transaction comparatively simple, especially when such transaction is examined in the light of the declared purpose of the Act.

As the statute was enacted to curb a widespread evil, it is a distinction without a difference that a short swing

profit is made by the acquisition of a right granted to a stockholder because of his stock ownership rather than for cash. Since Congress thought it necessary, in order to close any obvious avenue of evasion to treat "any contract to * * * otherwise acquire" as a purchase within the Act, the offering and granting by the corporation to its stockholders of rights or contracts permitting them to purchase common stock from the corporation at a stipulated price comes directly within the purview of the Act. It is plain that if in the process of statutory construction exceptions are allowed to creep into Section 16(b), in addition to the one it contains, the attrition of the Act will have begun. Only the broadest definition of "purchase" will prevent its emasculation. By giving it a meaning of any acquisition, a meaning, as has been seen, that is neither strained nor uncommon, will the word be interpreted in the light of the declared purpose of the Act.

In the Court below, the respondents argued that the rights issued to Dreyfus were but formal evidence of the rights he acquired when he bought his original stock and were inherent in his stock ownership; that the rights issued to him were analagous to a stock dividend, and since a stock dividend is distributed and not bought or purchased, the acquisition thereof by Dreyfus could not be considered a purchase.

The fallacy of respondents' reasoning is obvious. The offer and grant to stockholders of rights to subscribe to new stock of the corporation at a stipulated price is not of itself "a fruit of stock ownership in the nature of a profit" or dividend. The right to subscribe to new stock is an offer or contract by the corporation granting its stockholders, in preference to strangers, the privilege of contributing new capital to the corporation.

In *Miles v. Safe Deposit Co.*, 259 U. S. 247, the Court said:

> "It is not in dispute that the Hartford Fire Insurance Company is a corporation of the State of Connecticut, and that the stock increase in question was made under the authority of certain acts of the legislature and certain resolutions of the stockholders, by which the right to subscribe to the new issue were offered to existing stockholders upon the terms mentioned. It is evident, we think, that such a distribution, in and of itself, constituted no division of any part of the accumulated profits or surplus of the company, or even of its capital; it was in effect an opportunity given to stockholders to share in contributing additional capital, *not to participate in distribution.* It was a recognition by the company that the condition of its affairs warranted an increase of its capital stock to double the par value of that already outstanding, and that the new stock would have a value to the recipients in excess of $150 per share; a determination that it should be issued pro rata to the existing stockholders, or so many of them as would pay that price. *This privilege, of itself, was not a fruit of stock ownership in the nature of a profit; nor was it a division of any part of the assets of the company.*
>
> "The right to subscribe to the new stock was but a right to participate, in preference to strangers, and on equal terms with other existing stockholders, in the privilege of contributing new capital called for by the corporation."

In *Park & Tilford, Inc., v. Schulte*, 160 F. 2d 984, 988, cert. denied 68 S. Ct. 64, defendants owned preferred shares of the corporation. The board of directors passed a resolution authorizing the holders of the preferred stock to convert same into common stock. The defendants converted their preferred stock and thereafter sold the common stock within a six-month period, realizing a

profit thereon. The Court in holding that the conversion of the preferred stock by the defendants constituted a "purchase" within the meaning and intent of Section 16(b) of the Act, said:

> "Whatever might be the consideration involved in that situation, it is clear that here the defendants were not forced to convert, but instead made an every-day business decision as to the most profitable of three causes of action—redemption, conversion or outright sale of their preferred stock. Indeed, the contention that defendants were forced to convert is somewhat absurd, in view of the fact that since defendants controlled plaintiff they could have prevented the passage of the redemption resolution or rescinded it after it had been passed."

In the case at bar, respondent, Dreyfus, was an officer, director, chairman of the board and largest stockholder of the corporation. He owned approximately seven (7%) per cent of all the outstanding common stock and controlled the corporation's board of directors. Without his active support and acquiescence, the board of directors could not have passed the resolution authorizing the granting and issuance of the rights. Because of his position and control of the corporation he "could have prevented the passage" of the resolution "or rescinded it after it had been passed." He was not forced to sell the rights acquired by him, "but instead made an every-day business decision as to the most profitable of three causes of action"—personal exercise of the right by subscribing to and paying for new common stock, outright sale of the rights or permitting the rights to lapse. The corporation did not force Dreyfus to dispose of the rights. The election rested with him alone. In electing to sell a majority of the rights, he was admittedly actuated by the financial advantage accruing from the sale of the rights.

Dreyfus urged that it was more practical and profitable for him to sell the rights than subscribe to the common stock and pay the subscription price therefor. The respondent, however, overlooks the fact that as an officer and director of the corporation, he was subject to the provisions of Section 16(b) of the Act. Thus had Dreyfus subscribed to the common stock pursuant to the terms of the rights granted him and had he then sold the stock within a six-month period he concededly would be liable for the profits thereafter made.

As Mr. Justice Clark so aptly pointed out in his dissenting opinion in the United States Court of Appeals, at record page 73:

> "* * * So inside advance knowledge of an approaching issue of stock with grant of share-rights might point to the retention of stock already owned or the purchase of more, while the oridinary investor remains ignorant of the attractive possibilities about to open before him. In this instance, in fact, the gain is directly in money received on sale of the rights; if care must be taken to avoid direct subscription to the stock followed by sale—since that is within the statute under *Park & Tilford, Inc. v. Schulte, supra*—yet that means simply a quicker return on a smaller investment. In all these instances the principle seems to me the same; the insider has an obvious and attractive advantage over others, unless all are held to be within the statute."

POINT 2.

The disposition by "gift" by respondent, Dreyfus, of the 1460 shares of the common stock of Celanese constituted a "sale" within the meaning and intent of Section 16(b) of the Securities Exchange Act of 1934.

Section 3(a)(14) of the Securities Exchange Act of 1934, Title 15, U. S. C. A., Section 78c(a)(14), declares that:

> "The term 'sale' and 'sell' each include any contract to sell *or otherwise dispose of.*" (Italics supplied.)

The word "sale" itself was not defined by the Act. But in enlarging its scope by Section 3(a)(14) Congress disclosed a clear intent to give it a broad, unrestricted meaning. Its full import is to be sought, therefore, from its associated words and the declared purpose of the Act.

Since the word "sale" as used in the Act has been defined to include "otherwise dispose of," it would be pertinent to see how the word "dispose" and "dispose of" are defined in the English language.

"Bouvier's Law Dictionary," Third Edition, defines the word:

> "Dispose. To alienate or direct the ownership of property, or disposition by will."

Funk & Wagnall's "New Standard Dictionary of the English Language," defines

> "Dispose. 4. To make over; alienate or distribute; *as, to dispose one's fortune in charity; now generally expressed by dispose of.*" (Italics supplied.)

The definition of the word "sale" in the act to include the phrase "otherwise dispose of" was put there with a purpose. If Congress had intended that the "sale" be for cash it would not have been necessary to broaden the meaning of the word to include "otherwise dispose of." The purpose of broadening the ordinary definition of the word "sale" can have no other meaning but that it was the legislative intent to include any disposition of securities, and this would necessarily include a "gift."

In *Dickey v. Raisin Proration Zone No. 1*, Cal. App. 140 P. (2d) 53, 64, subsequent opinion Sup. 151 P. (2d) 505, a statute authorized a program committee to stabilize the market price of agricultural commodities by *disposing of* the surplus commodities. The Court held that the phrase "dispose of" in the statute authorized the committee to "give away" the surplus portion of the crop.

In *Troy Amusement Co. v. Attenweiler* (Crt. of Appeals, Ohio, 1940), 28 N. E. 2d 207, 64 Ohio App. 105, 121, a statute penalized anyone "who sells or disposes of" a ticket representing an interest in a scheme or chance. The Court, in holding that the phrase "disposes of" means also a "gift," said:

> "The statutes penalize anyone who sells or disposes of a ticket representing an interest in a scheme of chance. The phrase 'dispose of' used as it is, in connection with the word 'sells,' indicates that one may be guilty of an offense against the statute by gratuitously disposing of a ticket or device representing an interest in a scheme of chance."

In the Court below the respondents argued that a "gift" is not a "sale" as defined by Section 3(a)(14) of the Securities Exchange Act of 1934 because the donor received no consideration for the "gift." They further argued that even if the "gift" made by Dreyfus should

be construed a "sale" within the definition of the Act, Dreyfus, incurred no liability under the Act because he did not realize any profit on the transactions.

We respectfully submit that not only did the "gift" by Dreyfus constitute a "sale" under the provisions of the Act, but that Dreyfus did realize a profit on the transactions which inures to and is recoverable by the corporation.

The price at which Dreyfus purchased the stock was $50 per share. When he made the "gifts" the price at which the stock was selling for on the New York Stock Exchange ranged from between $57 3/8-$65 5/8 per share.

Title 26—Internal Revenue Code—Section 1005, Act of June 6, 1932, Ch. 209, Section 506, 47 Stat. 248, provides as follows:

> "If a gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

Thus the value of the gifts made by Dreyfus was the value of the stock at the time the gifts were made. If instead of making the gifts in stock, Dreyfus had first sold the stock within six months from the date of purchase and then given the *cash* realized from the sale to the donees, he concededly would have been liable to the corporation for the difference between the purchase and sales prices; this would be considered his "profit."

It is obvious that Dreyfus found it more expedient and profitable to make the gifts in stock than in first selling the stock and giving the gifts in cash, for only by doing the former could he hope to even attempt to escape the penalties provided for in Section 16(b) of the Act. If officers and directors were permitted to make gifts in stock to their relatives, friends and employees within six months from the date of their

purchases of the stock (the market value of the gifts on those dates being higher than the purchase price) without being liable to their corporations for the difference, evasion of the Act would become a simple matter. They could then do indirectly and with impunity that which they could not accomplish directly, without incurring the liability in the Act. They could then purchase stock of their corporation, and if the market went up within six months, they could make a "gift" thereof to their relatives and close friends. If these relatives and friends immediately sold the stock, the corporation could not recover the profits thereon. The way would be left open to unscrupulous directors and officers to make secret arrangements with these relatives and friends for the return of the profits realized from the sale of the stock within the six-month period. Proof of such secret arrangements would be very difficult and could hardly if ever be established. The very purpose and intent of the Act would be circumvented and defeated.

The purpose and intent of Congress in enacting the Act was "to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director or stockholder and the faithful performance of his duty." *Smolowe v. Delendo Corporation, supra.*

That Court also said (p. 238) that any interpretation that could make evasion possible and thus result in the emasculation of the Act must be avoided.

Only the broadest definition of "sale" will prevent its emasculation. By giving it a meaning of any disposition, a meaning, as has been seen, that is neither strained nor uncommon, will the word be interpreted in the light of the declared purpose of the Act.

As Mr. Justice Clark so aptly pointed out in his dissenting opinion in the United States Court of Appeals, 172 F. (2d) 140, 143, at record pages 72-73:

> "When we turn to the purpose of the legislation, to wring the profit out of short-swing transactions by insiders, I should think this same result was indicated. If these transactions are without the scope of the Act, we have an area of considerable inducement to the insider to play for the short swing. When, indeed, the insider is a person of ample means and large public interests (as 'insiders' I fancy are prone to be), then the inducements here may be as substantial as, if not more so than, in the more prosaic cases heretofore decided. If one has at hand so ready a means of recompensing faithful personal service at home or in the office, or of making the ties of personal loyalty of company executive officers yet stronger than before, or, indeed--though this case is not before us—of remembering bountifully one's favorite charities, I should think the necessity of doing so only through the use of the stock itself, instead of the money which might be realized therefrom, was one which could be accepted with considerable tranquility."

CONCLUSION.

It is respectfully submitted that the writ of certiorari herein prayed for should issue.

March, 1949.

Respectfully submitted,

MORRIS J. LEVY,
Attorney for Petitioner.

APPENDIX.

Section 27 of the Securities Exchange Act of 1934 (Title 15, U. S. C., §78aa), reads as follows:

> "The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A. Sect. 78p (b), provides as follows:

> "(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security)

within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Section 3(a) subdivision 13 of the Securities Exchange Act of 1934, Section 78c(a), subdivision (13) of Title 15 U. S. C., reads as follows:

"The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

Section 3(a) subdivision 14 of the Securities Exchange Act of 1934, Section 78c(a), subdivision (14) of Title 15 U. S. C., reads as follows:

"The term 'sale' and 'sell' each include any contract to sell or otherwise dispose of."